

After reviewing the record, hearing the arguments and considering the briefs of the parties, the Appeals Board finds as follows:

The Special Administrative Law Judge found claimant was entitled to a fifteen percent (15%) permanent partial general disability of his right arm which resulted from a work-related injury on October 15, 1992. Claimant takes the position that the Special Administrative Law Judge erred in finding that the claimant had only suffered a scheduled injury as the evidence in the record established that the claimant had sustained a whole body injury. In fact, since the evidence has established a whole body injury, the claimant argues that he is entitled to permanent partial disability benefits based on a work disability of between forty-five to fifty percent (45-50%). Respondent, on the other hand, requested the Appeals Board affirm the Special Administrative Law Judge's holding that the claimant's permanent partial general disability should be limited to his right arm, a scheduled injury.

The Special Administrative Law Judge found that the medical records only substantiated that claimant had received injury to his right arm. He cites the case of Bryant v. Excel Corp., 239 Kan. 688, 722 P.2d 579 (1986) as holding that the situs of the disability and not the situs of the injury determines the amount of workers compensation benefits available. The only medical evidence that is contained in the record are the medical records of the treating physician, Charles E. Rhoades, M.D. The evidentiary deposition of Dr. Rhoades was not taken by either the respondent or the claimant. Dr. Rhoades is an orthopedic surgeon located in Kansas City, Missouri. Claimant was referred to him by a physician in Topeka, Kansas, who had been treating the claimant conservatively without much progress. Claimant first saw Dr. Rhoades on June 24, 1993. Dr. Rhoades' diagnosis was that the claimant had ruptured his right pectoralis major muscle when he was kicked by an inmate while working for the respondent. On August 4, 1993, Dr. Rhoades operated on the claimant to repair this ruptured muscle. Dr. Rhoades released the claimant to return to regular work on November 16, 1993. He last examined the claimant on January 20, 1994, and gave him a fifteen percent (15%) permanent partial impairment to the right upper extremity due to cramping and decreased strength of abduction. Dr. Rhoades noted that the claimant's cramping complaints were in the pectoralis muscle area. The Appeals Board notes that the pectoralis muscle is the large chest muscle which connects the chest wall with the arm. Later, at the request of the claimant's attorney, Dr. Rhoades converted the fifteen percent (15%) upper extremity rating in accordance with the AMA Guides to a nine percent (9%) whole body impairment rating. Dr. Rhoades also placed permanent restrictions on the claimant of no overhead lifting and a single lift limit of fifty (50) pounds.

At the regular hearing, the claimant testified that in addition to the numbness and tingling that he had in his fingers, his shoulder would lock up on him up to three (3) times per month. He further asserted that his shoulder also became symptomatic after he had been working on automobiles. The Appeals Board, as a trier of fact, is not bound by medical evidence and is free to consider all the evidence presented and decide for itself the percent of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). In this case, the Appeals Board finds that the medical records of Dr. Rhoades and the claimant's testimony prove that his permanent partial general disability should not be restricted to a scheduled injury. Claimant severely injured his right pectoralis major muscle when he was kicked by an inmate. Dr. Rhoades performed complicated surgery to repair this ruptured muscle. Accordingly, the Appeals Board concludes the claimant's functional impairment is Dr. Rhoades' nine percent (9%) whole body rating.

Claimant presented evidence through Bud Langston, vocational rehabilitation consultant, on the issue of work disability. However, the claimant returned to his regular job at a comparable wage on November 16, 1994, even though it was on a different shift. The Appeals Board concludes that pursuant to K.S.A. 1992 Supp. 44-510e(a), the presumption of no work disability applies in this case as the claimant has returned to work for the respondent at a comparable wage. Additionally, the job claimant returned to is a regular job and not a make-shift temporary job. The presumption of no work disability is rebuttable, but in this case the Appeals Board finds that the evidence in the record does not rebut the presumption. See Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738 (1993). Since the presumption applies, the claimant's disability, if any, is limited to the percentage of functional impairment. Since the Appeals Board has already found the claimant's functional impairment is nine percent (9%), it is the conclusion of the Appeals Board that the claimant is entitled to an award of nine percent (9%), permanent partial general disability.

The Appeals Board further incorporates herein the findings of Special Administrative Law Judge William F. Morrissey, as set forth in his Award dated April 20, 1995, to the extent that they are not inconsistent with the findings and conclusions expressed in this order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated April 20, 1995, is modified as follows:

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR of the claimant, Richard W. Amaro, and against the respondent, Youth Center of Topeka, and its insurance carrier, State Self-Insurance Fund, for an accidental injury sustained on October 15, 1992, and based on an average weekly wage of \$401.16.

Claimant is entitled to 15.43 weeks of temporary total disability compensation at the rate of \$267.45 per week or \$4,126.75, followed by 399.57 weeks at \$24.07 per week for a total of \$9,617.65 for a nine percent (9%) permanent partial general disability, making a total award of \$13,744.40.

As of August 31, 1995, there is due to the claimant, 15.43 weeks of temporary total compensation at the rate of \$267.45 per week or \$4,126.75, plus 134.57 weeks of permanent partial general disability benefits at \$24.07 per week, in the sum of \$3,239.10, for a total due and owing of \$7,365.85 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$6,378.55 shall be paid at \$24.07 per week for 265 weeks until fully paid or until further order of the Director of Workers Compensation.

All other findings and orders of the Administrative Law Judge in his Award are adopted and incorporated herein by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of August, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frank D. Taff, Topeka, Kansas
Robert E. North, Topeka, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director